Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1995

CLEVE E. SAPP,

Petitioner,

v.

POWER COMPUTING COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where an age discrimination plaintiff has established a prima facie case and the defendant meets its minimum burden of stating a legitimate, nondiscriminatory reason for the discharge by stating that during a reduction in force, plaintiff was compared with other individuals to determine who would be retained and plaintiff was found to be least qualified and therefore terminated, must the plaintiff present evidence that he was "clearly better qualified" than the other individuals retained to withstand summary judgment?

2. At the summary judgment stage, does the court invade the fact-finding province of the jury when it grants summary judgment for the employer in an age discrimination claim of pretext on the basis that the summary judgment evidence fails to support a "clearly better qualified" determination as opposed to a merely "better qualified" determination? If not, what legal principle of evidence review differentiates evidence of "clearly better qualifications" from "better qualifications"?

3. Where an age discrimination plaintiff has established a prima facie case and the defendant meets its minimum burden of stating a legitimate, nondiscriminatory reason for the discharge by stating that during a reduction in force, what degree, kind and amount of evidence beyond the prima facie case, if any, must a plaintiff produce to withstand summary judgment.

4. Can circumstantial evidence of lack of good faith in the reduction-in-force employee selection process

QUESTIONS PRESENTED – Continued

along with circumstantial evidence of anti-age animus (consisting of past comments by the president in a previous force reduction, age classification as part of the decision making process, and reduction results mathematically establishing adverse effects on older employees) viewed as a whole support a pretext inference at the summary judgment stage in an age discrimination claim of an equally or better qualified candidate?

PARTIES TO THE PROCEEDINGS

Petitioner Cleve E. Sapp is the plaintiff in this case. The defendants in the case, respondents here, are Power Computing Company and McDermott, Inc.

Petitioner Cleve E. Sapp states, pursuant to Rule 29.6 of the Rules of this Court, that he is an individual and accordingly has no corporate affiliations.

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PETITION FOR A WRIT OF CERTIORARI

This appeal of summary judgment for the employer in an Age Discrimination in Employment Act case involves the issue of what amount and type of evidence is required to support an inference of pretext. The Fifth Circuit in this case held that an age discrimination plaintiff must present at the summary judgment stage evidence that he was "clearly better qualified" than other employees retained in a reduction in force and that Plaintiff's summary judgment evidence failed to meet that burden without setting forth any cognizable dividing line between evidence of "better qualifications" and "clearly better qualifications". In doing so, the Fifth Circuit ignored and/or categorized and dismissed as irrelevant other evidence of pretext. Petitioner challenges the Fifth Circuit's review framework and application as it invades the province of the jury at best and at worst completely destroys the protections of the ADEA to individual plaintiffs seeking review of discretionary employment actions.

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1-3) and the court's order denying rehearing (Pet. App. 13) are not reported. The district court's summary judgment (Pet. App. 4-12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1996. (Pet. App. 1) Petitioner's motion for rehearing was denied on May 24, 1996, and the mandate then issued. (Pet. App. 13-14) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in pertinent part that "[i]t shall be unlawful for an employer – (1) to . . . discharge any individual . . . because of such individual's age."

STATEMENT

Mr. Sapp brought this action alleging that his employment with Power Computing Company (hereinafter, PCC) was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. and alternatively in violation of the Texas Commission on Human Rights Act, TEX. LABOR CODE ANN. § 21.001 et seq. Mr. Sapp also sued McDermott Incorporated, a parent company of PCC.[1] Defendants filed their motion for

[1] McDermott's part of Defendant's summary judgment motion sought summary judgment on the issue of McDermott being a separate and independent corporation, unrelated to the personnel decisions of PCC. This issue was sharply contested by Plaintiff. The district court never reached this issue because it determined that Mr. Sapp had not presented sufficient evidence of pretext regardless of the responsible party or parties.

summary judgment after which Mr. Sapp filed his response together with attached summary judgment evidence of not only his prima facie case but also that PCC's proffered reason for the termination was not true and of anti-age animus. The district court did not hold a hearing. The district court issued its Memorandum Opinion and Order granting summary judgment in favor of Defendants and taxing costs against Plaintiff on the basis that Mr. Sapp had failed to raise a fact issue on pretext for age discrimination. (Pet. App. 11)

Mr. Sapp timely appealed. Again without a hearing and without analysis of the facts, the United States Court of Appeals for the Fifth Circuit in a per curium panel opinion affirmed the trial court's summary judgment based on what it states is Mr. Sapp's failure to show that he was " 'clearly better qualified' (as opposed to merely better or as qualified)" than the employees retained. (Pet. App. 2) Mr. Sapp's request for rehearing was denied. (Pet. App. 13)

A. FACTUAL BACKGROUND

1. Mr. Sapp had a long term satisfactory work history with PCC. Mr. Sapp, at the time of his termination in May of 1994, was 56 years old and had just shy of 38 years of service to PCC and its forerunners. (TR 2: 022)[2] Mr. Sapp began his employment in the operations side of the business and held the positions of computer operator,

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[2] The transcript of the district court is made up of two volumes and is cited as "TR [Vol. #]: [page #]". The transcript has been returned to the district court clerk. (Pet. App. 14)

computer operator group leader, supervisor of I-O control, manager of a data center, customer support manager, national account coordinator, national technical support and staff consultant. He then spent a year in the sales side of the business as a national account representative. He moved back to operations and held the positions of Cyber(CDC)/Univac operations manager, IBM operations manager, customer hotline support. Moving to administration, he helped develop and start the company's change control system, and after that moved on to Quality Assurance/data and physical security, security officer, and finally back to operations as a tape/print team leader. (TR 2: 022)

Mr. Sapp had never received a substandard review. (TR 2: 022) After assuming one of four tape/print team leader positions in August of 1993, he was never told that he was doing a bad job or that anyone had a problem with his work. (TR 2: 022-23)

2. PCC's reduction in force did not eliminate Mr. Sapp's position. PCC's business is that of computer outsourcing in which PCC provides computer processing and support to its customers. (TR 2: 290) Historically, one of its areas of business has been supporting the nuclear power industry. (TR 1: 055) Many of the services and equipment used to support the nuclear power industry were unique to that industry. (TR 2: 057-58) For example, the nuclear industry primarily used Cyber, CDC and Univac computers and were the only clients utilizing PCC's quality assurance auditing services (QA audits). (TR 2: 047-48, 272) The remainder of PCC's clientele primarily utilized IBM related computers.

In the late 1980's and early 1990's, PCC's nuclear business dwindled while its IBM related business prospered. (TR 2: 198) This decline of the nuclear business resulted in several reductions in force focusing on personnel working primarily on the nuclear side of PCC's business. This was the reason for a reduction in force taking place in May of 1994 at PCC. (TR 1: 291)

While there was a reduction in force taking place, there was no reduction in force in the tape/print team leader positions, one of which was held by Mr. Sapp. (TR 2: 113, 115-16, 158-59, 162) Mr. Sapp was replaced on his day-shift by one of the night-shift team leaders, Mr. Roger Carlson (age 44) and Mr. Carlson was replaced by Mr. Ray Munchrath (age 49), previously the QA auditor, a position in QA/TQM department. (TR 2: 160-61, 296-316) There was no change in the other two team/leader positions held by Mr. Tommy Moore (age 41) and Mrs. Pat Vernon (age 57). (TR 1: 056) Mrs. Vernon, however, was out on medical leave in May of 1994 and never returned to work. (TR 2: 071-72)

Prior to accepting the job as night shift team leader, Mr. Munchrath was told that his position as QA auditor was being eliminated and that he could either retire or take the job as night shift team leader. (TR 2: 069-72) Mr. Munchrath did not want to retire but he also did not want a night shift position and made that fact known to Donn Holsinger, the individual offering him the team/leader position. (TR 2: 075)

3. PCC's stated non-discriminatory justification for termination lacked credibility and sensibility. When Mr.

Sapp was terminated, he was not provided an explanation for the termination. Mr. Sapp's termination papers, however, stated that the reason for the termination was a reduction in force. No further explanation was provided to Mr. Sapp until he filed an EEOC complaint. In response to Mr. Sapp's EEOC complaint, Linda Hillin, from the human resources department of PCC, made a statement that for the first time explained that a comparison had been done among five individuals available to hold the four team leader positions based on the individuals' skills, experience and versatility and that Mr. Sapp was ranked lowest among the five because his skills were not as good and he had less versatility. (TR 2: 290-94) Mrs. Hillin filed an affidavit in support of Defendant's motion for summary judgment stating the same things (TR 1: 054-57) but both of these were later largely recanted by Mrs. Hillin in her deposition because she only had personal knowledge of the ultimate determination to terminate Mr. Sapp and move Mr. Munchrath to the team/leader position, not the comparison process. (TR 2: 242-273)

Donn Holsinger, the supervisor to Mr. Sapp's direct supervisor took responsibility for ranking the four then current team leaders and Mr. Munchrath and for making the decision to terminate Mr. Sapp. (TR 2: 113-19) However, on deposition inquiry, Mr. Holsinger could not remember the categories used to rank the individuals but could only refer to the Hillin letter to the EEOC, a letter written months after Mr. Sapp's termination. (TR 2: 118) Mr. Holsinger further admitted that he had been with PCC for only a year and a half, had been a hierarchical supervisor over the team leader position for less than a

year, (TR 2: 101-04) had very limited contact with the team leaders, (TR 2: 126) and had never supervised Ray Munchrath in the separate QA/TQM department.

Mr. Holsinger further admitted that in doing his ranking, he did not seek the aid of the team leaders' immediate supervisors, did not refer to the personnel files of the people being ranked, nor seek the help of any other person or document. (TR 2: 114, 116)

4. The alleged comparison of employees included illogical criteria and even then was often simply inaccurate. Mr. Holsinger suggests that in evaluating the four current team leaders and Mr. Munchrath based on their skills, experience, and versatility he determined that the other four individuals possessed better skills and experience and were more versatile as it concerned the present and future needs of PCC. (TR 1: 060) (TR 2: 291-94, 378) Mr. Munchrath (ranked no. 4) and Mr. Carlson (ranked no. 3), both younger than Mr. Sapp were ranked above Mr. Sapp based on their total quality management skills (TQM), sometimes called the Continuing Improvement Program (CIP), and on their QA auditing skills. (TR 1: 060) (TR 2: 140, 291-94, 378) However the TQM/CIP program had been a "disaster" at PCC and had basically ended in the fall of 1993, well over six months before Mr. Sapp was terminated. (TR 2: 050-56, 090-93, 132-33, 153-56) Furthermore, the declining need for QA auditing was the reason Mr. Munchrath's original position was terminated. (TR 2: 057-58, 272) After May of 1994, Mr. Munchrath had not performed a single QA audit. (TR 2: 057) The lack of any true comparison clearly shows up in Mr. Carlson being ranked above Mr. Sapp on QA auditing experience when Mr. Sapp was the most experienced QA

auditor PCC had after Mr. Munchrath. (TR 2: 042-48, 077) Mr. Carlson was still receiving QA training.

Mr. Moore (the youngest of the people being considered at age 40) was ranked no. 1 by Mr. Holsinger. (TR 2: 378) This rating was based on his alleged superior CDC/CRAY experience (TR 2: 378) and, according to the EEOC letter by Ms. Hillin, because he was the only one with a previous performance review in the team leader position and because of his well considered performance. (TR 2: 293) However, the decline in the CDC/CRAY business was the reason for the reduction in force and in other positions within operations and sales, primary CDC/CRAY skills were listed as justifications for laying persons off. (TR 2: 134-38, 141-42, 347) In May of 1994, Mr. Moore had been with PCC less than four years with all of that time spent as a computer operator under Mr. Carlson's supervision or as a team leader. (TR 2: 207-23, 343, 375) His performance reviews revealed that he did not have good management skills, (TR 2: 338-42) revealed that he was graded down on his knowledge of IBM processes, (TR 2: 335-36) and it was predicted that he would not advance above his current position. (TR 2: 337)

Pat Vernon, older than Mr. Sapp by a total of five months, was ranked number two out of five by Mr. Holsinger (TR 2: 378) because she had purchasing and microfiche experience, neither of which was required in the team leader position. (TR 2: 131-40) Even so, Mr. Sapp often traded out with purchasing tasks with Mrs. Vernon and also had microfiche experience. (TR 2: 023) Furthermore, in May of 1994, Mrs. Vernon was out on medical leave and has not worked a single day since May of 1994. (TR 2: 071-72, 273, 328)

None of the other persons considered for the team/leader position had been as versatile as Mr. Sapp. (TR 2: 022) Mr. Moore had only been with the company since 1990 and had always been in tape/print operations. (TR 2: 335-43) Mrs. Vernon prior to becoming a team leader in the fall of 1993, had spent the last fifteen years as an operations services manager or supervisor. (TR 2: 329-30) Mr. Carlson had been employed by Control Data (linked to the CDC/Cyber since 1974) and came to PCC in 1988 where he was a customer support specialist, CIP facilitator/trainer, Cyber(CDC)/Cray operations supervisor and a team leader with primary experience in the CDC area. (TR 2: 332-34) Ray Munchrath, while having some managerial experience in the early 1970s, spent the last 10 years as a QA auditor outside the operations department. (TR 2: 41, 49)

It was unquestioned that even though the Cyber(CDC)/Cray and Nuclear auditing business was coming to an end, the company would always need individuals with customer relations experience, hotline help experience, data security experience, physical security experience, change-control experience, and general management experience. Mr. Sapp in his 38 years with PCC and its forerunner companies had all of this experience and versatility. (TR 2: 022) In addition, Mr. Sapp as a current team leader and former IBM operations manager, had proven knowledge of the IBM processes that were the future of the company. (TR 2: 022) What little CDC/Cray and QA auditing requirements that remained could also be handled by Mr. Sapp who was currently a lead QA auditor and formerly a Cyber(CDC)/Univac operations manager. (TR 2: 022-23)

5. Age was a more sensible explanation for Mr. Sapp's termination than any good-faith attempt to compare experience, skills and versatility. Mr. Holsinger did not attempt to make himself aware of Mr. Sapp's previous positions with the company that shed light on his skills and versatility, and that is his experience. (TR 2: 114, 116, 122) The fact that Mr. Holsinger was more concerned about the age of the individuals that he is laying off is found in his own written recommendation in which he continually states how many of the individuals he is recommending for termination are in the "protected class" (he mistakenly believes the protected class begins at age 45). (TR 2: 378)

PCC's upper management, all of whom were younger than Mr. Sapp, made an issue of the age of the people they were recommending for termination. (TR 2: 021, 081, 098-99, 152, 227) "Service/Age" was the fourth area on a matrix (along with skills, experience and versatility) set up by the personnel department as a category to be considered by those individuals making termination recommendations. (TR 2: 347-348, 378) This category however is completely ignored by Mrs. Hillin in her EEOC position letter and Mr. Holsinger's documented review. (TR 2: 290-99, 350) Furthermore, the personnel department did company-wide age calculations both before and after the layoff tracking the effect the layoff had on the overall age of the company. (TR 2: 353-60, 377)

6. Mathematical analysis of the May 1994 layoff support an inference that older employees were targeted. Age analysis done on the operations department, the department still run by the President of the company, Robert Andrews, (who told Mr. Sapp in the late 1980's

just prior to Mr. Sapp being transferred away from his job as IBM operations manager, that "you know how it is, sometimes us old fogies must move over for these younger dynamic guys") shows that the eldest people were targeted. (TR 2: 024-31)

Mr. Holsinger made the decision as to who was going to be laid off in console operators, full and part time tape/print operators and tape/print team leaders. In the area of console operators, the average age before the layoff was 35.5 years. (TR 2: 024-31, 348) The average age of those four people ranked highest and thus recommended for layoff was 43.5 (three of the four were over 40 and the other lacked less than 6 months of being 40). (TR 2: 024-31, 137-39, 348, 351-52, 361-76) The average age of those not recommended for layoff was 33.07 years. (*Id.*) The only person over 40 years of age not recommended for layoff was Dan Zalaznick who had worked under Mr. Holsinger at his prior company and had transferred to PCC at about the same time approximately a year before the layoff. (TR 2: 100-01) Due to a resignation just before the layoff, Mr. Holsinger's recommendation was not followed exactly and one of the individuals in the protected class initially recommended for layoff was retained. (TR 2: 137-39, 358) However, the average age of the console operators laid off was 39.67 and those remaining after the layoff was 34.61. (TR 2: 024-31)

None of the tape/print operators were over 40. (TR 2: 024-31) However, in the area of fulltime operators, Mr. Holsinger recommends for layoff the person with the most service to the company and who is one of the three individuals over thirty in the position. (TR 2: 024-31, 357) Mr. Holsinger's primary recommendation is that all of

the part time operators be retained but recommends that the oldest of them be laid off if any of them must be included in the layoff. (TR 2: 024-31, 351-52)

Also, in the operations department, two tape services employees are removed. The only person over 50 years of age is laid off (TR 2: 349-50) and Julia Duran, age 44, is transferred to the QA department to take up the slack when Ray Munchrath's, age 49, (TR 1: 054-57) auditing position is eliminated. Prior to the layoff, the average age of the tape service employees was 45. (TR 2: 024-31) The 51 year old employee was laid off, the 44 year old employee was transferred, leaving an average age of the three remaining at age 40. (TR 2: 024-31)

In the area of tape/print team leader, the average age of the team leaders prior to the layoff was 49.25. (TR 1: 054-57) (TR 2: 024-31) The average age after the layoff was 44.33. (TR 2: 024-31) The average age of persons not working after the layoff was 56.5. (TR 2: 024-31) The average age of the persons expected to remain in the position (evidence that Pat Vernon was permanently disabled and in fact never returned and evidence that Ray Munchrath was offered the night shift position to encourage him to find another job) was 42. (TR 2: 024-31).

B. DISTRICT COURT PROCEEDINGS

Without the aid of a hearing, the district court granted summary judgment. The district court correctly ruled that Mr. Sapp established a prima facie case of age discrimination and that PCC had carried its burden of articulating a legitimate, non-discriminatory reason for the employment decision. (Pet. App. 7) Citing *St. Mary's*

Honor Center v. Hicks, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747, 124 L.Ed.2d 407 (1993), it then looked to Mr. Sapp to "produce admissible evidence that the proffered reasons are not in fact the reasons for the employment decision, and are merely a pretext for age discrimination." The district court quickly and summarily dismissed all evidence that the asserted comparison of employees was based on illogical criteria, not performed in a good faith attempt to ascertain the most qualified individuals and in fact resulted in picking significantly less qualified individuals to retain, on the basis that it would not second-guess employment decisions and without some direct or circumstantial evidence of actual age discriminatory intent, casting doubt on the decision-making process would not raise a pretext fact issue.[3] (Pet. App. 8-9)

The trial court then dismissed the anti-age remark of PCC's president as being too remote to be evidentiary, dismissed the consideration of age and length of service in the decision-making process as not evidentiary of age discrimination, and dismissed the evidence of reduction in age in the operations department as being of insufficient quality to raise a genuine issue of fact on the issue of discriminatory animus. (Pet. App. 9-11) Finding no evidence raising a genuine issue of fact as to whether

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[3] The trial court's preoccupation with anti-age intent evidence is in part explained by the then pending en banc rehearing of *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), in which the Fifth Circuit overturned a 1993 panel's holding that the Fifth Circuit was a pretext plus circuit.

PCC's proffered reason was mere pretext for discrimination, the trial court granted summary judgment for PCC. (Pet. App. 11-12)

C. COURT OF APPEALS RULINGS

Mr. Sapp appealed the trial court's ruling on the basis that the summary judgment evidence was sufficient to raise a fact question of pretext as he had brought forth evidence that he was significantly better qualified, that the comparison process was a sham, and that age was in fact the true reason for the discharge. The court of appeals affirmed the trial court's summary judgment but did so without addressing the correctness of the trial court's rationale. (Pet. App. 1-3) Instead, it oversimplified Mr. Sapp's argument to be merely that PCC's "determination was a poor one, i.e. that Sapp was as qualified or more qualified than some of the others with whom he was compared." The appeals court proposes that a fact finder may infer pretext only if it finds that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for the job opening]." citing *E.E.O.C. v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995). The appeals court then summarily and without factual analysis finds that Mr. Sapp's summary judgment evidence does not rise to that level. (Pet. App. 2-3) Motion for rehearing attacking the "clearly better qualified" standard and the court's lack of attention to other pretext evidence was denied. (Pet. App. 13)

REASONS FOR GRANTING THE PETITION

The Court of Appeals in this case, after affirming that a prima facie case of age discrimination had been established and that PCC had articulated a legitimate, non-discriminatory reason for discharge, establishes an erroneous evidentiary requirement at summary judgment that wrongfully invades the province of the jury and unfairly restricts victims of age discrimination from the court house. The court of appeals requirement that victims of age discrimination when faced with employee qualification comparison justifications, present evidence at summary judgment showing that he was "clearly better qualified" than the other employees retained while completely ignoring other evidence that the comparison process was a sham and/or circumstantial evidence of age consideration is a novel, unprecedented approach to evaluating pretext evidence. The approach is erroneous in legal basis, untenable in application, and invades the province of the jury to review all the evidence as a whole in determining whether the employment decision was discriminatory on the basis of age.

This Court should address this erroneous summary judgment evidentiary requirement to insure the continuation of the protections of the age discrimination statute.

I. THE COURT OF APPEALS ADOPTED A NOVEL SUMMARY JUDGMENT EVIDENTIARY REQUIREMENT IN AGE DISCRIMINATION CASES THAT IS UNTENABLE AND INVADES THE PROVINCE OF THE JURY.

The Fifth Circuit's requirement of evidence supporting a "clearly better qualified" determination at summary

judgment is a fatally flawed extension of an otherwise valid concept recognized only in the Fifth Circuit. In cases stemming back to 1985, the Fifth Circuit has held that if the fact finder were to determine that the plaintiff was clearly better qualified than the employees who were retained, it is entitled to conclude on that fact alone that the employer's articulated reasons are pretext. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 647 (5th Cir. 1985), *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992), *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993); *Odom v. Frank*, 3 F.3d 839, 845 (5th Cir. 1993); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993); *E.E.O.C. v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996).

However, beginning with *Odom v. Frank*, 3 F.3d at 845, and continuing with *E.E.O.C. v. Louisiana Office of Community Services*, 47 F.3d at 1444, the court extended the "clearly better qualified" standard to reverse fact finders when, in the court's determination, the evidence showed at best that the plaintiff was "merely better qualified" or "as qualified". There was no evidence in these cases that the standards applied in the employee comparison were irrational under the circumstances or that age was a consideration. *Id.* at 1444-46.

The case at bar is the first case in which the court applies the "clearly better qualified" evidentiary requirement in a summary judgment review. Counsel has found no other Federal Circuit utilizing the "clearly better qualified" standard to prevent or overturn a fact finder's determination.

A. SUMMARY JUDGMENT FRAMEWORK IN DISCRIMINATION CASES

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. See, e.g., Fed.R.Civ.P. 56(c); see generally *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, see, e.g. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970), and in assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought, see, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). The inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers, and depositions must be viewed in the light most favorable to the party opposing the motion. See, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curium).

In an employment discrimination case, the plaintiff has the burden at the outset of "proving by the preponderance of the evidence a prima facie case of discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). Once the plaintiff has presented a prima facie case

of discrimination, the defendant has the burden of producing, " 'through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center v. Hicks*, 509 U.S. at 507, 113 S.Ct. at 2747 (quoting *Burdine*, 450 U.S. at 254-55 and n. 8, 101 S.Ct. at 1094 and n. 8).

If the defendant articulates a non-discriminatory justification for its employment action, the plaintiff then has the full and fair opportunity to demonstrate through presentation of his own case and through cross-examination of the defendant's witnesses, that the proffered reason was not the true reason for the employment decision and that he has been the victim of intentional discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 507-08, 113 S.Ct. at 2747-48. "The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.*, 509 U.S. at 511, 113 S.Ct. at 2749.

A plaintiff who has established a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action. *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 2611 (1995). A plaintiff need only point to evidence establishing that the employer's proffered explanation is unworthy of credence.

Id., at 728. In assessing inferences that may be drawn from the circumstances surrounding a termination of employment, the court must be alert to the fact that employers seldom note in employee personnel files that their motives are expressly forbidden by law and therefore the victim of discrimination usually must rely on circumstantial evidence. See, e.g., *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d at 638; *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988). Because plaintiffs in discrimination cases must often rely on inferences, and because courts should not grant summary judgment unless the evidence could not support any reasonable inference for the non-movant, summary judgment should seldom be used in employment-discrimination cases. *Oldham v. West*, 47 F.3d 985, 988 (8th Cir. 1995). Summary judgment is not favored in claims of employment discrimination. *Waggoner v. City of Garland*, 987 F.2d at 1164. When state of mind is at issue, summary judgment is less fashionable because motive or intent is inherently a question of fact which turns on credibility. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d at 956 n 3.

B. "CLEARLY BETTER QUALIFIED" IS AN ERRONEOUS STANDARD

It is under this framework that Mr. Sapp found himself battling a proffered justification that in a reduction in force situation, a review of five employees available for the four team leader positions was made and based on the employees' skills, experience and versatility, he was

ranked last. Mr. Sapp's evidence of age discrimination went beyond his prima facie case. He countered with evidence:

1. That while there was a reduction in force going on in the company, there was no reduction in force in his position;

2. That he was substantially better qualified in skills, experience and versatility than most, if not all, of the four retained employees;

3. That the comparison process was a sham as was evidenced by the comparing supervisor's reliance after the fact on the comparison categories enunciated in the discrimination charge response, lack of familiarity of the comparing supervisor with the employees being compared, his failure to seek any information concerning the employees being compared, and his use of criteria to rank employees ahead of Mr. Sapp that were not pertinent to the team leader position, that were inconsistent with the circumstances surrounding the reduction in force and other employment decisions; and,

4. That the termination was more likely motivated by age since the president of the company had made an anti-age statement directly to Mr. Sapp during a previous reduction situation, a review of the May 1994 lay-offs in the operations department, still headed by the president, revealed that in each case, the older workers were targeted, age was on the review matrix provided to the supervisors who were making the layoff decisions, the number of individuals in the protected class that were being laid off were specifically pointed out by the person terminating Mr. Sapp to his senior management, and that

by laying off Mr. Sapp, PCC had a good chance of getting rid of not only Mr. Sapp, age 56, but also Pat Vernon, age 57, out on medical leave with severe medical problems, and Ray Munchrath, age 49, who himself was replaced in his audit duties by a younger individual and who was known not to want the team leader night shift position that was being given to him.

The Fifth Circuit disregards all of this evidence and grants summary judgment because it finds that the summary judgment evidence of comparative skills, experience and versatility does not rise to the level of "clearly better qualified." The Fifth Circuit's summary analysis of this case violates this Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), rejecting a jury instruction that a racial discrimination plaintiff must prove that she was better qualified than the employee receiving the promotion. This Court made clear in *Patterson* that when an employer raises the defense of better qualifications, the plaintiff must have the opportunity to demonstrate that the employer's proffered reasons for its decision were not its true reasons and that in doing so, the plaintiff is not limited to presenting evidence of a certain type. *Id.*, 491 U.S. at 187-88, 109 S.Ct. at 1378. This might include evidence that the plaintiff was "better qualified" but the Court recognized that other types of evidence also may shed light on the pretext issue. *Id.* See also *Rossy v. Roche Products, Inc.*, 880 F.2d 621, 625 (1st Cir. 1989) (Summary judgment not appropriate when record is not clear who is the better candidate), *cert. denied after remand*, 502 U.S. 941 (1991); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir.

1994) (Pretext can be inferred from evidence that a plaintiff who was not promoted was more qualified.) The second circuit goes even further and holds that qualifications do not matter if other evidence leads to a finding that illegal discrimination contributed to the employment decision, *Gillin v. Federal Paper Board Co.*, 479 F.2d 97, 101-02 (2d Cir. 1973), and more recently that pretext may be demonstrated by reliance on the evidence comprising the prima facie case, without more, *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 38 (2d Cir. 1994).

The Fifth Circuit's use of the "clearly better qualified" standard on summary judgment is error because not only is the standard too high as pointed out above, but also because the Fifth Circuit used the standard in a way that ignored the other evidence inferring discriminatory intent. Neither the Fifth Circuit nor the district court addressed the evidence tending to show that the comparison process was a sham, developed after the fact and utilized criteria that were inconsistent with the surrounding layoff. In addition the Fifth Circuit completely ignored the evidence that age was a more likely motivating factor and thus never addressed Mr. Sapp's point on appeal that the trial court erred when it disregarded such evidence.

The trier of fact should consider all the evidence, giving it whatever weight it deserves. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. at 1481 n. 3. Evidence of the prima facie case, the sham or inconsistencies in the employer's justification, the age consequences on the present and related employment decisions, anti-age statements, the fact that age was brought up in the decision making process must be

viewed together and not in isolation. See, *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 49-50 (1st Cir. 1990) (a pretext-plus analysis).

In this case, the trial court erred by disregarding the anti-age intent evidence by separating each type of evidence and holding that each was insufficient by itself to raise a fact issue. The trial court rejected the mathematical analysis of the layoff which showed that in the operations division, all layoff's targeted the eldest individuals. The trial court disregarded the mathematical analysis on the basis of small sample size and lack of analytical technique. (Pet. App. 11) It erred because the mathematical analysis did not involve a sample but involved everyone in the operations department. Furthermore, the analysis consisted of ranking by age the individuals recommended for layoff and then averaging the age of those retained and laid off. It was not a complex mathematical analysis but made the point quite well that the oldest employees in each job function were targeted. This evidence should have been considered as part of the whole. The Second Circuit has held that similar mathematical evidence by itself creates a fact question. See, *Maresco v. Evans Chemetics, Division of W.R. Grace and Co.*, 964 F.2d 106, 113 (2nd Cir. 1992) (Evidence that two or three older employees and none of twenty younger employees were laid off presented circumstances which give rise to an inference sufficient to withstand a motion for summary judgment that age was impermissibly considered in the employment decision.)

The trial court also disregarded the anti-age statement of the president of PCC that "you know how it is,

sometimes us old fogies must move over for these younger dynamic guys" as being too remote to raise a fact question. (Pet. App. 9) When combined with other evidence of pretext and age animus, the remoteness of an anti-age comment goes to the weight of the evidence to be decided by the fact finder.

The trial court also disregarded the fact that age was one of the considerations being weighed at the time of the decision (i.e. age was one of the columns on the evaluation matrix supplied by PCC to its supervisors and that the supervisor making the decision to lay off Mr. Sapp documented how many individuals in the protected class he was laying off) based on a stance that the employer must be able to review service/age in the employment decision as an evaluation of pension and other benefits that may be applicable. (Pet. App. 10) In doing so, the trial court erred factually in its otherwise impermissible fact finding that the consideration of age was part of the benefit analysis after the termination decision was made. This was simply not the case.

The Fifth Circuit's use of the "clearly better qualified" standard on summary judgment is also error because not only is the standard too high and too exclusive of other evidence as pointed out above, but also because the standard by necessity requires the court at the summary judgment stage to make a factual determination of the difference between "better qualified" and "clearly better qualified." On motions for summary judgment, a court cannot try issues of fact; it can only determine whether there are issues to be tried. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 106 S.Ct. at 2510; *Chambers v. TRM Copy Centers Corp.*, 43 F.3d at 36.

II. THE COURT SHOULD CORRECT THE LOWER COURTS' RULINGS IN ORDER TO INSURE THE CONTINUATION OF THE PROTECTIONS OF THE AGE DISCRIMINATION STATUTES.

The factual inquiry in a discrimination case is whether the defendant intentionally discriminated against the plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. "To survive an employer's summary judgment motion, only a genuine factual issue with regard to discriminatory intent need be shown, a requirement that is almost always satisfied when the plaintiff's evidence, 'direct or circumstantial, consists of more than the McDonnell Douglas presumption.' " *Lam v. University of Hawai'i*, 40 F.3d 1551, 1559 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)). See also Justice Rehnquist's dissenting opinion in the writ denial of *Hardin v. Pitney Bowes, Inc.*, 451 U.S. 1008, 1008-10, 101 S.Ct. 2345, 2346, 68 L.Ed.2d 861 (1981) ("It is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment." "Summary judgment simply may not be granted when such matters as the defendant's motive and intent are questioned.")

This Court needs to review this case to strike down a Fifth Circuit summary judgment evidentiary requirement that deprives the discrimination victim his day in court by requiring the plaintiff to prove that he was "clearly better qualified" than his replacement which requirement wrongfully views the comparison evidence in isolation under an inappropriately high standard that usurps the fact finding province of the jury. Without review, the Fifth

Circuit will be allowed to continue to inappropriately disregard all evidence of pretext and discriminatory intent without analysis of the evidence as a whole and thus deprive age discrimination victims of their day in court. This is especially true since as yet, no legal objective framework has been established to separate as a matter of law, "better qualifications" from "clearly better qualifications."

In reviewing this "clearly better qualified" standard, this Court can further clear up the dispute between the circuits as to what evidence beyond the prima facie case is required to survive summary judgment at the pretext stage of analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931
Summary Calendar

CLEVE E. SAPP,

Plaintiff-Appellant,

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3-94-CV-2518-R)

(Filed April 23, 1996)

Before KING, JOLLY, and PARKER, Circuit Judges.

PER CURIAM:*

Cleve E. Sapp filed suit in federal district court in Dallas against Power Computing Company ("PCC") and its corporate parent, McDermott Incorporated ("McDermott"), alleging that his employment with PCC was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 21.001 et seq. Upon completion of most of the discovery, PCC and McDermott filed a

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

motion for summary judgment. After Sapp filed his response, the district court granted summary judgment for the defendant. Sapp timely appealed.

The district court properly found, on the basis of the summary judgment evidence, that Sapp had established a prima facie case of age discrimination and that PCC had met its minimum burden of producing a legitimate, non-discriminatory reason for his discharge: during a reduction in force at PCC, Sapp was compared with other individuals to determine who would occupy the slots remaining after the reduction in force and Sapp was found to be the least qualified and therefore terminated. Sapp's appeal focuses on whether the district court was correct when it determined that the evidence that Sapp produced was not sufficient to allow a jury to find that this reason was a mere pretext for age discrimination. Sapp attempted to show in the district court, and argues on appeal, that the rationale articulated by PCC for the decision to discharge him was not the true reason by arguing that the decision was a poor one, i.e., that Sapp was as qualified or more qualified than some of the others with whom he was compared. As PCC correctly argues, however, a fact finder may infer pretext only if it finds that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for a job opening]." *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995). We have reviewed the evidence proffered by Sapp, consisting mainly of his own subjective evaluation of the relative qualifications of the employees at issue, and we agree with the district court that it does not rise to that level.

Sapp argues that the district court improperly relied on Sapp's lack of direct evidence of age discrimination. We have reviewed the district court's opinion with care, and we find no such reliance. In the interval since the district court's decision, this court has issued its en banc decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), and the district court's opinion in this case fares well under the rationale adopted in *Rhodes*.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT OCURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEVE E. SAPP, *Plaintiff,*	§	CA 3-94-CV-2518-R
vs.	§	(Filed Sept. 6, 1995)
POWER COMPUTER COMPANY and MCDERMOTT INCORPORATED, *Defendants.*	§	

MEMORANDUM OPINION AND ORDER

Now before this Court is the Motion for Summary Judgment of Defendants. Plaintiff alleges that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA") and the Texas Commission on Human Rights Act. For the reasons stated below, the Motion is **GRANTED**.

BACKGROUND FACTS

Until his discharge in may 1994, Plaintiff Cleve E. Sapp ("Sapp") was employed by Defendant Power Computing Company ("PCC") as one of four team leaders in his department. He had been employed by PCC and its predecessors since 1956. PCC is a subsidiary of a subsidiary of McDermott Incorporated ("McDermott").

In response to market conditions, PCC implemented reductions in force in 1992, 1993, and again in 1994. During the 1994 reduction in force, one position in Sapp's department was eliminated, that of Quality Assurance

Auditor held by Ray Munchrath ("Munchrath"). Rather than discharge Munchrath, PCC decided to consider him for a team leader position. Munchrath, Sapp and the other thee team leaders were evaluated and ranked by manager Donn Holsinger to determine the four candidates that would best meet PCC's present and future needs. Holsinger's recommendation was approved by another manager, Bill Prange. Sapp was ranked fifth in the group and discharged.

At the time of his discharge, Sapp was fifty-six years old. Munchrath was forty-nine. The other three team leaders were fifty-seven, forty-four and forty-one. As evidence of age discrimination, Sapp points to a comment made in the "late 1980's" by the president, then head of operations, of PCC that "sometimes us old fogies must move over for these younger dynamic guys." Sapp has also pointed to a decline in the average age of various groups of employees as a result of the reduction in force, and finally to the fact that length of service and age were noted during the reduction.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[1] All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion.[2]

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[1] FED.R.CIV.P. 56(c).

[2] *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

Indeed, as long as there appears to be some evidentiary support for the disputed allegations, the motion must be denied.[3] A summary judgment motion may be "opposed by any kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . . "[4] However, summary judgment must be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[5]

In an action under the Age Discrimination Employment Act ("ADEA"), summary judgment for the defendant is appropriate when the plaintiff has failed to make out a prima facie case of discrimination.[6] As well, it may be appropriate if, after the defendant has rebutted the plaintiff's prima facie case with legitimate non-discriminatory reasons for its employment decision, the plaintiff fails to produce evidence that such reasons are merely a pretext for discriminatory animus.[7]

In age discrimination cases, a prima facie case is established when the plaintiff presents evidence (1) that he was discharged; (2) that he was qualified for the position, (3) that he was within the protected age group; and (4) that he was (i) replaced by someone outside the

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[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. Gen. Adjustments Bureau*, 640 F.2d 584, 595 (5th Cir. 1981 (en banc)).

[4] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[5] *Id.* at 323.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

[7] *See Bodenheimer*, at 957.

protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age.[8]

PCC contends that because this is a reduction in force case the Court should require Sapp to establish the slightly modified prima facie case applicable in reduction in force scenarios, which requires either direct or circumstantial evidence of age discrimination.[9] However, the prima facie case set out above addresses both the standard age discrimination scenario and the reduction in force situation. If the position has been filled by another person, then the presumption of discrimination is created by evidence that the replacement was younger or outside the protected age group. If the position is eliminated altogether, the plaintiff may still create an inference of discrimination by presenting evidence of discrimination.

Sapp has established a prima facie case. It is undisputed that he was discharged. Sapp has presented evidence that he was qualified, and PCC has conceded this in the course of arguing that he was less qualified than the four people who were retained. At age fifty-six, Sapp was within the protected class of people over age forty. Finally, Sapp presented evidence that PCC filled the position with Munchrath, a forty-nine year old whose position was eliminated at the time.

Once a prima facie case is established by the plaintiff, the burden then shifts to the defendant to articulate a

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[8] *Id.*

[9] *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981).

legitimate, non-discriminatory reason for the employment decision.[10] PCC has carried this burden with evidence that it was downsizing the company, that it eliminated at least one position from Sapp's department, and that Sapp was discharged after being compared to other more qualified employees.

Once the defendant meets the burden of producing a legitimate explanation, the burden shifts to the plaintiff to produce admissible evidence that the proffered reasons are not in fact the reasons for the employment decision, and are merely a pretext for age discrimination.[11] The plaintiff must be able to point to evidence that the defendant was motivated by discriminatory animus in their employment decision.[12] in support of his case, Sapp presents a detailed analysis of the criteria used to decide which employees to retain. As further evidence of pretext, Sapp presents (1) a remark made by a senior official in the company over five years ago; (2) a decline in the average age of employees after the reduction; and (3) the fact that service and age were noted during the reduction in force.

Sapp's attempt to break down the criteria used by PCC to compare the five employees fails to strengthen his case. It is well settled that the ADEA was not intended to be a vehicle for second-guessing employment decisions

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[10] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[11] *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

[12] *Id.*

nor to transform the courts into personnel managers.[13] "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated."[14] It is not enough to simply cast doubt on the employer's decision-making process; the plaintiff must be able to point to direct evidence of discriminatory intent, evidence that the employer deviated from standard evaluation practices, or other differences in treatment and placement of employees that correlates to age.[15] Sapp has not pointed to anything in the evaluation process that would lead the Court to conclude that PCC's employment decisions were driven by age discrimination.

The remark "sometimes us old fogies must move over for these younger dynamic guys" does not show pretext. For an isolated remark to constitute evidence of discrimination, it must be (1) made by either the decision maker or someone whose recommendation was considered by the decision maker, (2) related to the specific employment decision challenged, and (3) made close in time to the decision.[16] The remark set forth by Sapp was made years ago in the context of an entirely separate restructuring of the company by someone who did not participate in the decision to discharge Sapp.

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[13] *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988).

[14] *Id.*

[15] *Id.*

[16] *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992).

Similarly, consideration of an employee's length of service and age is not evidence of age discrimination: The Fifth Circuit has rejected any argument to the contrary and stated that such a rule would work the absurd result that an employer would be unable to discuss pension and severance packages with a discharged employee.[17]

For lack of any other proof, the statistical evidence alone must establish that PCC's proffered reasons for discharging Sapp were mere pretext for age discrimination. Gross statistical disparities which result from a reduction in force may be evidence of discriminatory intent.[18] However, the statistics must be strong enough to rebut the valid, nondiscriminatory reason for the discharge.[19] To rebut an employer's explanation on the basis of statistics alone would be a "challenging endeavor" indeed.[20]

Generally, a plaintiff using statistical proof must make the required showing of discrimination by comparing persons qualified for the position at issue.[21] However, evidence that the average age of the work force as a whole has decreased dramatically may also indicate discriminatory intent.[22] In either case, the statistical evidence must be of a quality that raises a genuine issue of

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[17] *Bodenheimer*, 5 F.3d at 958.

[18] *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992) (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir. 1983)).

[19] *Id.*

[20] *Thornbrough*, 760 F.2d at 647; *Walther*, 977 F.2d at 162.

[21] *E.E.O.C. v. American Airlines, Inc.*, 835 F.Supp. 911, 914 (N.D. Tex. 1993).

[22] *See Schulz v. Hickok Mfg. Co.*, 358 F.Supp. 1208, 1213 (N.D. Ga. 1973).

fact as to whether the employer was driven by discriminatory animus.

Sapp's evidence fails to meet the challenge. He has analyzed three different groups of people: console operators, tape/print team leaders, and tape service employees. For each group, Sapp computed the average age of persons considered for discharge, the average age of the persons not considered for discharge, and the average age of each group before and after the termination. Sapp averaged the numbers without the benefit of statistical analysis, the Court notes not the inadequacy but rather the utter absence of statistical "technique". Each group is numerically quite small. The most relevant group, the team leaders group of which Sapp is a member, is composed of only five people all of whom are in the protected age group. Only one person, Sapp, was laid off. Accordingly, the numbers have virtually no statistical significance.[23] In short, the Court cannot find that the numbers alone constitute probative evidence of pretext.

Sapp has failed to present any evidence which raises a genuine issue of fact as to whether PCC's proffered reasons were mere pretext for discrimination. The motion for summary judgment is granted on this ground. Accordingly, the Court does not reach the question of

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[23] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1987) (small or incomplete data sets and inadequate statistical techniques are typical weaknesses of statistical proof); *see also International Board of Teamsters v. United States*, 431 U.S. 324, 339-340 n. 20 (1977) (small sample size detracts from value of statistical evidence).

whether PCC's parent company, McDermott should be treated as Sapp's employer.

CONCLUSION

For the reasons stated above, the Motion is **GRANTED.** It is so **ORDERED.**

SIGNED THIS 5 DAY OF SEPT , 1995.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT COURT
CHIEF JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931

CLEVE E SAPP

Plaintiff - Appellant

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(May 24, 1996)

Before KING, JOLLY, PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

REHG-2

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
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June 5, 1996

Ms Nancy Hall Doherty, Clerk
Northern District of Texas, Dallas
United States District Court
1100 Commerce Street
Room 14A20
Dallas, TX 75242

No. 95-10931 Sapp v. Power Computing Co
USDC No. 3:94-CV-2518-R

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits are returned:

(2) Volumes ( ) Envelopes ( ) Boxes

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Marianna Tomeny
Marianna Tomeny,
Deputy Clerk

cc: (letter only)
Honorable Jerry L Buchmeyer
Mr Bryan Cyril Collins
Mr John W Reeder

MDT-1

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

No. 96-307

In The

Supreme Court of the United States

October Term, 1995

CLEVE E. SAPP,

Petitioner,

v.

POWER COMPUTING COMPANY and McDERMOTT INCORPORATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioner's contention that the courts below disregarded some of his evidence, when the opinions below say and clearly show that both courts fully considered the evidence.

2. Whether this Court will grant certiorari to consider Petitioner's contention that, in order to show that the employer's comparison between Petitioner and other employees was a pretext for discrimination, he need only show that he was as or better qualified than the other employees, not "clearly better qualified," or whether the "clearly better qualified" standard, which was used by the Fifth Circuit in this case, and is in accordance with the decisions of the other Circuits, is a proper method for distinguishing between a possibly mistaken personnel decision and a pretext for discrimination.

PARTIES TO THE PROCEEDINGS

Respondents, Power Computing Company and McDermott Incorporated, are the Defendants. The parent company of McDermott Incorporated is McDermott International Incorporated. The subsidiaries and affiliates of McDermott Incorporated are listed on pages 14 through 22 of the appendix to this brief.

Petitioner, Cleve E. Sapp, is the Plaintiff.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondents, Power Computing Company and McDermott Incorporated, respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The District Court's opinion (Resp. App. 4) is not reported. The opinion of the Court of Appeals (Resp. App. 1) and its order denying rehearing (Resp. App. 13) are not reported.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

PROVISION OF LAW INVOLVED

29 U.S.C. § 623

It shall be unlawful for an employer – (1) to . . . discharge any individual . . . because of such individual's age.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff-Petitioner Cleve Sapp ("Sapp") was employed by Respondent Power Computing Company ("PCC")[1] as a "team leader" in his department. PCC's business has involved computer outsourcing for a wide range of business and technical applications, and included a software Quality Assurance program that has been approved by the Nuclear Regulatory Commission.[2] (TR 1: 055)[3]

PCC projected that the Quality Assurance business would decrease dramatically in 1995. (TR 1: 055) For this and other reasons, PCC, in 1994, implemented its third reduction in force within a three-year period ("the reduction in force"). (TR 1: 055) In connection with the reduction in force, PCC desired to retain the personnel with the most diversified skills who would best serve the company's needs at that time and also its anticipated or projected needs in the future. (TR 1: 055-56) As part of the reduction in force and in response to the reduced demand for Quality Assurance services, PCC decided to eliminate

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[1] PCC is a subsidiary of a subsidiary of Respondent McDermott Incorporated.

[2] The Quality Assurance program at PCC involved a collection of government regulations and industry standards that controlled the computer software and services provided to the nuclear industry. (TR 1: 055)

[3] This form of citation refers to the volume and page number of the trial court record.

the position of Quality Assurance Auditor, which was held at the time by Ray Munchrath.[4] (TR 1: 055)

Since Munchrath, who was 49 years old at the time of the reduction in force, had skills which PCC determined would be valuable in the future, including skills which would allow him to operate effectively as a team leader in the Computer Operations field, PCC decided to consider retaining Munchrath in one of the four team leader positions in Computer Operations. (TR 1: 056) At that time, four employees, one of whom was Sapp, held a team leader position. All of them, like Munchrath, were over 40 years old.[5] (TR 1: 056)

All five employees were evaluated to determine the four who would best serve PCC's needs in the present, as team leader, and in the future. (TR 1: 056) The manager of Computer Operations, Donn Holsinger, was responsible for recommending which four of the five employees were to be retained. (TR 1: 060) Holsinger considered versatility, skills, and experience when determining which persons would best be able to serve the present customer base as well as future customers. (TR 1: 060)

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[4] After the implementation of the reduction in force, the remaining responsibilities of the Quality Assurance Auditor were performed by three PCC employees who also maintained other positions within the Company. (TR 1: 055) Munchrath remained available to perform auditing tasks as needed. (TR 1: 055)

[5] As of May 25, 1994, the date Sapp was discharged, the ages of the five compared individuals were: Pat Vernon – 57, Cleve Sapp – 56, Ray Munchrath – 49, Roger Carlson – 44, and Tommy Moore – 41. (TR 1: 056)

Holsinger concluded that Sapp was the employee who should be included in the reduction in force. In Holsinger's opinion, Sapp's qualifications did not meet the current and projected needs of PCC as well as those of the other four employees. (TR 1: 060) Holsinger concluded that Sapp's primary skills were in areas which were not projected to be among PCC's current or future business needs, and that in the team leader position and in areas targeted for growth, his skills and experience were less than those of the other four employees. (TR 1: 060) Holsinger's recommendation was approved by the manager of Production and Operational Services, Bill Prange, and Sapp was discharged in May, 1994. (TR 1: 060; TR 2: 022)

B. District Court Proceedings

Sapp filed the instant suit in the United States District Court for the Northern District of Texas, alleging that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C., § 621, et seq., and the Texas Commission on Human Rights Act, Tex. Labor Code, § 21.001, et seq. On May 26, 1995, Respondents filed a motion for summary judgment and on September 5, 1995, the District Court, Hon. Jerry Buchmeyer, granted summary judgment in favor of Respondents. Holding that Sapp met his burden of establishing a *prima facie* case of discrimination and that PCC had articulated a legitimate non-discriminatory reason for discharging Sapp, the Court, in accordance with *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504, 113 S.Ct. 2742, 2747 (1993), required Sapp to "point to evidence

that the defendant was motivated by discriminatory animus in their employment decision." (Resp. App. 8)[6]

The Court noted that evidence produced by Sapp consisted of his analysis of the criteria issued by PCC to decide which employees to retain, as well as "(1) a remark made by a senior official in the company over five years ago; (2) a decline in the average age of employees after the reduction; and (3) the fact that service and age were noted during the reduction in force." (Resp. App. 8) The Court concluded that Sapp had not pointed to anything in the evaluation process which indicated "that the employer deviated from standard evaluation practices, or other differences in treatment and placement of employees that correlates to age," that the alleged remark was not sufficiently related to the employment decision of which Sapp complained to constitute evidence of age animus, that Sapp's statistical evidence was not "of a quality that raises a genuine issue of fact as to whether the employer was driven by discriminatory animus," and that "consideration of an employee's length of service and age is not evidence of age discrimination." (Resp. App. 9-11) Thus, the District Court held that Sapp "failed to present any evidence which raises a genuine issue of fact as to whether PCC's proffered reasons were mere pretext for discrimination." (Resp. App. 11)

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[6] This form of citation refers to the page number of the Appendix to this Brief In Opposition.

C. Court of Appeals' Proceedings

The Fifth Circuit affirmed with a *per curiam*, unpublished opinion. Noting that Sapp's appeal focused on whether PCC's assigned reason for Sapp's termination, that he was the least qualified of the five candidates for the four available positions, was a "mere pretext for age discrimination," the Court held that Sapp could not sustain this burden "by arguing that the decision was a poor one, i.e., that Sapp was as qualified or more qualified than some of the others with whom he was compared." (Resp. App. 2) Rather, the Fifth Circuit held, such a comparison may justify an inference of pretext only if there is a showing that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for a job opening]" (Resp. App. 2) (citing *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995)). Stating that it had "reviewed the district court's opinion with care," the Fifth Circuit concluded that the District Court's decision to grant summary judgment was appropriate. (Resp. App. 3)

REASONS FOR DENYING THE PETITION

I. SUMMARY JUDGMENT IS APPROPRIATE IN EMPLOYMENT DISCRIMINATION CASES.

Petitioner's argument begins (p. 19 of his Petition) with the contention, not mentioned in his "Questions Presented," that summary judgments should seldom be

granted in employment discrimination cases. Clearly, however, employment discrimination cases are not an exception to Rule 56(c) of the Federal Rules of Civil Procedure, which mandates summary judgment against a party who fails to make a showing sufficient "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Further, summary judgment is not to be viewed as a procedural shortcut, "but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327, 106 S. Ct. at 2555. Accordingly, in employment discrimination cases, no issue of fact exists and summary judgment is proper if there is no competent evidence of an intent or motivation of the employer to discriminate against the employee on the basis of his age. *See, e.g., Mesnick v. General Elec. Co.*, 950 F.2d 816 (1st Cir. 1991), *cert. denied*, 504 U.S. 985, 112 S. Ct. 2985 (1992); *Pfluger v. Southview Chevrolet Co.*, 967 F.2d 1218 (8th Cir. 1992). Indeed, in two of the three cases cited by Sapp for the proposition that summary judgment is not proper where there is a claim of employment discrimination, summary judgment in favor of the employer-defendant was affirmed. *See Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993); *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993).

Thus, summary judgment is entirely appropriate in employment discrimination cases when, as here, the plaintiff fails to present sufficient evidence of an intent to discriminate.

II. THE COURTS BELOW DID NOT DISREGARD PETITIONER'S EVIDENCE.

In order to prevail on his claim of age discrimination, Sapp had the initial burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 508, 113 S. Ct. at 2744. If Sapp was able to prove a *prima facie* case, the burden shifted to PCC and McDermott to articulate some legitimate non-discriminatory reason for PCC's actions. *Id.* Once non-discriminatory reasons for the adverse employment action had been stated, Sapp had the burden of proving that the articulated reasons were not the true reasons, but a pretext for discrimination. *Id.*[7]

Sapp conceded that PCC articulated legitimate, non-discriminatory business reasons for its decision to discharge Sapp. (TR 2: 003) Therefore, to avoid summary judgment, Sapp had to come forth with evidence that PCC's articulated reasons are a pretext for discrimination.[8] *St. Mary's Honor Ctr.*, 509 U.S. at 514-524, 113 S. Ct.

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[7] Sapp's claim of age discrimination under the Texas Commission on Human Rights Act is subject to the same burden shifting rules as his federal claim. *See, e.g., Adams v. Valley Fed. Credit Union*, 848 S.W. 2d 182, 187 (Tex. App. – Corpus Christi 1992, writ denied).

[8] One of the "questions presented" by Sapp is whether, once PCC had articulated legitimate nondiscriminatory reasons for his discharge, Sapp had to present *any* evidence of pretext to prevail. This "question" has already been answered in the affirmative by this Court in *St. Mary's Honor Ctr.*, 509 U.S. at 514-524, 113 S. Ct. at 2751-56, and the fact that Sapp must produce *some* evidence of pretext to avoid summary judgment is illustrated by the cases applying such a requirement discussed on pages 11-22 of this brief.

at 2751-56. "[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *St. Mary's Honor Ctr.*, 509 U.S. at 514-15, 113 S. Ct. at 2751. In other words, in order to meet this burden and avoid summary judgment as a matter of law, Sapp had to come forth with evidence that "(1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996).

At pp. 19-21 of the Petition, Sapp relies on (1) a contention that there was no reduction in force in his position, (2) his opinion that he was substantially better qualified than the retained employees, (3) his conclusion that the comparison process was a sham, and (4) an "anti-age" statement as well as statistics. He says that "the Fifth Circuit disregards all of this evidence" and relies solely upon its determination that Sapp had not shown himself "clearly better qualified." Thus, Sapp says, the Fifth Circuit has violated *Patterson v. McClain Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), reversed by statute on other grounds, 42 U.S.C. § 1981(b), which holds that, in order to establish pretext, the plaintiff is not limited to evidence of any certain type, but may rely on any evidence that will demonstrate that the employee's reasons are pretextual. *Id.*, 491 U.S. at 187-88, 109 S. Ct. at 2378-79.

The difficulty with Sapp's argument lies in its premise – there is no indication that the courts below disregarded any of Sapp's evidence. The district court specifically ruled that PCC "was downsizing the company" in the course of which it "eliminated at least one position from Sapp's department"; it held that the remark, "made years ago in the context of an entirely separate restructuring of the company by someone who did not participate in the decision to discharge Sapp," was not evidence of discrimination (citing *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992)); and it determined that Sapp's "numbers" were presented "without the benefit of statistical analysis" and comprised a group too small to be of significance (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97, 108 S. Ct. 2777 (1987), and *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40, 97 S. Ct. 1843 (1977)). (Resp. App. 8, 9, 11) The district court did not ignore evidence which Sapp offered as proof of pretext, it considered that evidence and found it wanting.

The Fifth Circuit, in its *per curiam* opinion, did not find it necessary to repeat every holding of the district court. Rather, it focused on the argument which it regarded as the one most strongly emphasized by Sapp – i.e., Sapp's claim that he was as qualified or more qualified than some of the other employees with whom he was compared. It then held that Sapp had not raised an inference of pretext. It held that a comparison between employees will permit the inference of pretext "only if [the factfinder could find] that 'the [plaintiff] employee was "clearly better qualified" (as opposed to merely better or as qualified) than the employees who are selected

[for a job opening],' " and that Sapp's evidence "does not rise to that level." (Resp. App. 2) The Fifth Circuit also specifically said that it "had reviewed the district court's opinion with care." (Resp. App. 3)

Petitioner thus has no basis for urging this Court to grant certiorari to decide that, opposite to the statements of the lower courts in their opinions, such courts did not consider and review all of Petitioner's evidence.

III. THE "CLEARLY BETTER QUALIFIED" STANDARD APPLIED BY THE FIFTH CIRCUIT IS APPROPRIATE AND IS SIMILAR TO THAT APPLIED BY THE OTHER CIRCUITS.

Finally, Sapp argues that the "clearly better qualified" standard followed by the Fifth Circuit in this case is "too high." Respondents submit that the "clearly better qualified" standard is entirely appropriate in this case, is a correct application of the policy of the ADEA, and is in line with the holdings of other Circuits.

A. The "Clearly Better Qualified" Standard Is Appropriately Applied To Claims Of Age Discrimination.

As noted above, in order to prevail on his claim of age discrimination, Sapp was required to produce some evidence that the legitimate non-discriminatory reason articulated by PCC for discharging him was pretextual. Thus, when, as here, the employer's reason is that the plaintiff's qualifications were less than those of the retained employees, and the plaintiff attempts to show

pretext by comparing his and the other employees' qualifications, the plaintiff cannot succeed merely by showing that the employer was mistaken, i.e., that plaintiff was as qualified or better qualified than the others. "The inquiry is whether the plaintiff has been discriminated against because of his age; the ADEA proscribes no other conduct." *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S. Ct. 2658 (1984). Thus, the courts' inquiry is limited to "whether the employer gave an honest explanation of its behavior." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988). As explained by the Fifth Circuit in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985), the basis for the "clearly better qualified" standard lies in the fact that "Everyone can make a mistake – but if the mistake is large enough, we may begin to consider whether it is a mistake at all." *Id.* at 647. The "clearly better qualified" standard is, therefore, an appropriate method for distinguishing between a possible "mistake" and "pretext," and, indeed, is necessary to prevent the ADEA from "transforming the courts into personnel managers." *Id.*

B. The Circuit Courts Have Uniformly Applied a Standard Similar To The One Applied By The Fifth Circuit.

Sapp notes that the Fifth Circuit requires evidence that a plaintiff was "clearly better qualified" than those who were retained in order to establish pretext, and argues that this Court should grant certiorari on the basis that no other Circuit utilizes the standard. While the terminology may differ, all Circuits use the "clearly better qualified" standard or a similar standard.

(1) Several Circuits have cited to Fifth Circuit cases setting out the "clearly better qualified" standard.

The First, Third, Fifth and Eighth Circuits, either specifically state that an employee seeking to prove pretext through evidence of a disparity in qualifications must be "clearly better qualified," or cite, without qualification, cases from the Fifth Circuit setting forth the "clearly better qualified" standard.

The First Circuit, in *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323 (1st Cir. 1996), articulated a standard very similar, if not identical, to "clearly better qualified." There, the plaintiff, claiming age discrimination under a state statute, attempted to show that the employer's reason for not promoting him was pretextual by producing evidence that the individual offered the position plaintiff sought was younger and that another agency had performed well under plaintiff's leadership. *Id.* at 329. Applying the burden shifting procedure applied to federal claims of age discrimination and quoting a Fifth Circuit decision following the "clearly better qualified" standard, the court affirmed summary judgment in favor of the employer. In so doing, the court stated:

> We refuse to second guess Prudential's hiring decision for a management position of this nature absent *clearer evidence of irrationality*. . . . "[U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by

> virtue of their own years of experience and expertise in the field in question."

Lehman, 74 F.3d at 329 (emphasis added) (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)).[9]

Instead of *Lehman*, Petitioner cites an earlier case, *Rossy v. Roche Products, Inc.*, 880 F.2d 621 (1st Cir. 1989), *cert. denied after remand*, 502 U.S. 941, 112 S. Ct. 379 (1991), for the principle that "Summary judgment not appropriate when record is not clear who is the better candidate." (Petition at p. 21). However, this overstates the holding of *Rossy*, in which the court held that "Differences in qualifications between [the plaintiff] and [his replacement] can be considered by the jury in determining if the decision to promote [the person chosen], allegedly based on qualifications, was *unreasonable or arbitrary*." *Id.* at 625 (emphasis added). Thus, *Rossy* does not stand for Petitioner's proposition that an employee who presents evidence that he was equally or merely better qualified than another has presented sufficient evidence to withstand summary judgment on the issue of pretext.

The Third Circuit, in *Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3rd Cir. 1988), cited the Fifth Circuit decision in *Thornbrough*, 760 F.2d at 647 for the well recognized principle that "[t]he ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into

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[9] The Eighth Circuit has also quoted the aforementioned passage from *Odom* as a consideration when comparing qualifications of candidates for a particular position to determine whether there is sufficient evidence of pretext. *See Kobrin v. Univ. of Minn.*, 34 F.3d 698, 704 n.4 (8th Cir. 1994).

personnel managers." *Id.* at 1216. In *Healy*, an age discrimination plaintiff presented evidence that a similarly situated younger employee who was retained after a reduction in force had been evaluated lower than plaintiff "in at least one category." *Id.* at 1217. In spite of this evidence, the court affirmed summary judgment in favor of the company, holding that the mixed evidence of plaintiff's superiority was "insufficient evidence of pretext to permit a reasonable fact finder to infer discrimination in the Company's selection of [the younger employee] over [plaintiff]." *Id.*[10]

(2) The other Circuits use standards similar to "clearly better qualified."

The remainder of the Courts of Appeals effectively apply the "clearly better qualified" standard. For example, the Court of Appeals for the District of Columbia has applied what can be described as a "clearly better qualified" standard when determining whether sufficient evidence of pretext has been presented to prevail in an employment discrimination case. In *Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180 (D.C. Cir. 1996), a bench trial judgment in favor of the employee-plaintiff on his discrimination claim was reversed in favor of the

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[10] *See also Billet v. CIGNA Corp.*, 940 F.2d 812, 826-29 (3rd Cir. 1991) (affirming directed verdict in favor of employer on age discrimination claim based on plaintiff's discharge during a reduction in force despite plaintiff's claim that he had much more experience than a retained employee in management and sales and that plaintiff had a history of "prior good evaluations").

employer, notwithstanding plaintiff's evidence on the issue of pretext that he was arguably better qualified than a person selected for the position:

> Evidence indicating that an employer misjudged an employee's performance or qualifications is, of course, relevant to the question whether its stated reason is a pretext masking prohibited discrimination . . . ; if the employer made an error *too obvious to be unintentional*, perhaps it had an unlawful motive for doing so. Short of finding that the employer's stated reason was indeed a pretext, however – and here one must beware of using 20/20 hindsight – the court must respect the employer's unfettered discretion to choose among qualified candidates. . . . Here the district court found that both [the person selected] and [the plaintiff] were qualified [for the position] – indeed the court went so far as to disclaim any suggestion that [the person selected] was not "highly qualified" – but found also that [the plaintiff] was the *more* qualified applicant. [Defendant] does not dispute that finding, *but it need not do so in order to prevail here*. Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates.

Id. at 1183 (emphasis added) (citations omitted).

The Sixth Circuit has also recently made clear that it will not allow a plaintiff to avoid summary judgment by simply presenting evidence that he may arguably have been better qualified than the competition for a particular position. In *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996), the plaintiff claimed she was not promoted because of, *inter*

alia, her age. Defendant responded by articulating a legitimate, non-discriminatory reason for its actions, i.e., that the plaintiff had not been promoted because it was about to implement a major computerization of facilities and plaintiff lacked skills needed. *Id.* at 797. Attempting to establish evidence of pretext and avoid summary judgment, the plaintiff presented affidavits from other employees stating (1) that plaintiff did "a good job" or "great job" and was "well qualified for the [position she was not promoted to]", (2) that plaintiff was better qualified than the person promoted, and (3) that it was unnecessary to promote someone with data processing experience. *Id.* at 801. The Sixth Circuit, noting that in some cases "facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was *so lacking* in merit as to call into question its genuineness," *id.* at 800, emphasis added, affirmed a summary judgment in favor of the employer:

> There is no doubt that [the person promoted] and [plaintiff] have differing strengths and weaknesses, and that [plaintiff] performed her duties as Office Manager and Acting Superintendent well. The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.

Id. at 801.

The Seventh Circuit has also applied what can only be described as a "clearly better qualified" standard when determining whether sufficient evidence of pretext

exists. In *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir. 1992), one of the plaintiffs discharged in connection with a reduction in force attempted to show pretext by evidence that her appraisals contained less criticism than the appraisals of some of the retained employees. The court held that such evidence "gets us nowhere" and affirmed summary judgment in favor of the employer:

> [T]he question is not whether the managers displayed skill in expressing subtle gradations in the supervisors' performance, but whether the managers' explanation is honest rather than fabricated to hide discrimination. . . . Plaintiffs have pointed to many facts and events that are *consistent* with age discrimination, but have presented no evidence that age *actually motivated* AT&T's decision to terminate them. Whether or not their skills were under-appreciated, their age was not held against them – and age is the only consideration the ADEA puts off limits.

Id. at 849, 851 (emphasis in original).

A Tenth Circuit decision, *Rea v. Martin Marietta Corp.*, 29 F.3d 1450 (10th Cir. 1994), is cited by Sapp for the principle that pretext can be inferred from evidence that a plaintiff who was not promoted was more qualified. However, the *Rea* court, citing without qualification the Fifth Circuit decision in *Thornbrough*, 760 F.2d at 647, found no evidence of pretext and affirmed summary judgment for the employer despite the fact that a younger employee who ranked lower than the plaintiff in departmental rankings was chosen for a particular position instead of plaintiff. *Rea*, 29 F.3d at 1457.

Moreover, in *Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993), the Tenth Circuit held that evidence that a plaintiff may have been better qualified than the person selected for a particular position is insufficient to establish pretext in an employment discrimination case. Reversing a bench trial decision in favor of the plaintiff-employee and rendering judgment in favor of the employer, the Tenth Circuit stated:

> It is conceivable that a plaintiff in a case such as this could be *so overwhelmingly better qualified* than another applicant that on this evidence alone a trial court could properly find pretext and intent to discriminate. However, the facts in the record do not suggest this was such a case. There was a difference in the qualifications of the two applicants here concerned. There was a difference in their experiences. . . . The trial court did not suggest that the difference in "qualifications" was the equivalent of discrimination. Again the court made no finding of discrimination. *Instead it considered that its finding of differences in qualifications was in itself sufficient to support a judgment for [the employee]. This cannot be.*

Id. at 247-48 (emphasis added).

The Eleventh Circuit has also ruled in a manner consistent with the "clearly better qualified" standard. In *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991), the plaintiff claimed he was denied a dealership with the defendant because of his race. As evidence of pretext, plaintiff argued that "his application and credentials were superior to those of the [white applicants who were selected]. According to the plaintiff, his community

contacts, net worth, proposed floor space, initial capital investment, and location presented a more favorable application package than that submitted by [the other candidates]." *Id.* at 953. The court affirmed a summary judgment in favor of defendant, holding that even the objective evidence of superior qualifications presented by plaintiff was insufficient to establish that defendant's articulated non-discriminatory reason for selecting another person for the position was a pretext for discrimination:

> Accepting plaintiff's conclusion that his application was superior . . . in virtually every listed aspect does not compel a decision in plaintiff's favor. To rebut plaintiff's prima facie case, *the defendant need not demonstrate that the individual . . . selected was actually more qualified than the plaintiff*, rather it must only show that it had a legitimate non-discriminatory reason for its action. . . . Although the plaintiff has produced scattered pieces of circumstantial evidence, none of it, even taken as a whole, raises sufficient questions to undermine [defendant's] non-discriminatory rationale.

Id. at 953, 954 (emphasis added).

The remaining Circuits have also affirmed summary judgments or directed verdicts in favor of employers even in situations where plaintiffs presented some evidence that reasonable persons could differ as to whether they were more qualified for a position than similarly situated younger employees. *See, e.g., Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2nd Cir. 1988) (Pretext can be found based on an argument that differences exist between the qualifications of a plaintiff and a similarly

situated employee outside the protected class only where facts exist that would indicate that a business decision was "*so lacking in merit* as to call into question its genuineness.") (emphasis added); *Conkwright v. Westinghouse Electric Corp.*, 933 F.2d 231, 235 (4th Cir. 1991) (If an employee's "ratings were *wildly out of line* with other indicia of an employee's performance then one may question whether the rating system had a bias in its implementation.") (emphasis added); *Merrick v. Farmers Insurance Group*, 892 F.2d 1434, 1438 (9th Cir. 1990) (Plaintiff failed to "raise a triable issue of fact that [defendant's] reasons for denying him [a promotion] were pretextual," notwithstanding evidence that plaintiff had been recommended by his supervisor and had "greater experience and . . . somewhat better job performance" than the person selected for the position.).

The cases discussed above show that when determining whether there is sufficient evidence of pretext in a case such as this, every Federal Circuit has either cited to or, in practice, applied the "clearly better qualified" standard utilized by the Fifth Circuit in this and prior cases. Further, Petitioner has cited no case, and we have found none, which questions or criticizes this standard. As such, there is no reason for this Court to grant certiorari.

CONCLUSION

This case raises no issue worthy of review by this Court. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Counsel for Respondents

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931
Summary Calendar

CLEVE E. SAPP,

Plaintiff-Appellant,

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3-94-CV-2518-R)

(Filed April 23, 1996)

Before KING, JOLLY, and PARKER, Circuit Judges.

PER CURIAM:*

Cleve E. Sapp filed suit in federal district court in Dallas against Power Computing Company ("PCC") and its corporate parent, McDermott Incorporated ("McDermott"), alleging that his employment with PCC was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 21.001 et seq. Upon completion of most of the discovery, PCC and McDermott filed a

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

motion for summary judgment. After Sapp filed his response, the district court granted summary judgment for the defendant. Sapp timely appealed.

The district court properly found, on the basis of the summary judgment evidence, that Sapp had established a prima facie case of age discrimination and that PCC had met its minimum burden of producing a legitimate, non-discriminatory reason for his discharge: during a reduction in force at PCC, Sapp was compared with other individuals to determine who would occupy the slots remaining after the reduction in force and Sapp was found to be the least qualified and therefore terminated. Sapp's appeal focuses on whether the district court was correct when it determined that the evidence that Sapp produced was not sufficient to allow a jury to find that this reason was a mere pretext for age discrimination. Sapp attempted to show in the district court, and argues on appeal, that the rationale articulated by PCC for the decision to discharge him was not the true reason by arguing that the decision was a poor one, i.e., that Sapp was as qualified or more qualified than some of the others with whom he was compared. As PCC correctly argues, however, a fact finder may infer pretext only if it finds that "the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected [for a job opening]." *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995). We have reviewed the evidence proffered by Sapp, consisting mainly of his own subjective evaluation of the relative qualifications of the employees at issue, and we agree with the district court that it does not rise to that level.

Sapp argues that the district court improperly relied on Sapp's lack of direct evidence of age discrimination. We have reviewed the district court's opinion with care, and we find no such reliance. In the interval since the district court's decision, this court has issued its en banc decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), and the district court's opinion in this case fares well under the rationale adopted in *Rhodes*.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT OCURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLEVE E. SAPP, *Plaintiff,*	§	CA 3-94-CV-2518-R
vs.	§	(Filed Sept. 6, 1995)
POWER COMPUTER COMPANY and MCDERMOTT INCORPORATED, *Defendants.*	§	

MEMORANDUM OPINION AND ORDER

Now before this Court is the Motion for Summary Judgment of Defendants. Plaintiff alleges that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA") and the Texas Commission on Human Rights Act. For the reasons stated below, the Motion is **GRANTED**.

BACKGROUND FACTS

Until his discharge in May 1994, Plaintiff Cleve E. Sapp ("Sapp") was employed by Defendant Power Computing Company ("PCC") as one of four team leaders in his department. He had been employed by PCC and its predecessors since 1956. PCC is a subsidiary of a subsidiary of McDermott Incorporated ("McDermott").

In response to market conditions, PCC implemented reductions in force in 1992, 1993, and again in 1994. During the 1994 reduction in force, one position in Sapp's department was eliminated, that of Quality Assurance

Auditor held by Ray Munchrath ("Munchrath"). Rather than discharge Munchrath, PCC decided to consider him for a team leader position. Munchrath, Sapp and the other three team leaders were evaluated and ranked by manager Donn Holsinger to determine the four candidates that would best meet PCC's present and future needs. Holsinger's recommendation was approved by another manager, Bill Prange. Sapp was ranked fifth in the group and discharged.

At the time of his discharge, Sapp was fifty-six years old. Munchrath was forty-nine. The other three team leaders were fifty-seven, forty-four and forty-one. As evidence of age discrimination, Sapp points to a comment made in the "late 1980's" by the president, then head of operations, of PCC that "sometimes us old fogies must move over for these younger dynamic guys." Sapp has also pointed to a decline in the average age of various groups of employees as a result of the reduction in force, and finally to the fact that length of service and age were noted during the reduction.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure allows summary judgment only where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.[1] All reasonable doubts and inferences must be decided in the light most favorable to the party opposing the motion.[2]

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[1] FED.R.CIV.P. 56(c).

[2] *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985).

Indeed, as long as there appears to be some evidentiary support for the disputed allegations, the motion must be denied.[3] A summary judgment motion may be "opposed by any kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves. . . . "[4] However, summary judgment must be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[5]

In an action under the Age Discrimination Employment Act ("ADEA"), summary judgment for the defendant is appropriate when the plaintiff has failed to make out a prima facie case of discrimination.[6] As well, it may be appropriate if, after the defendant has rebutted the plaintiff's prima facie case with legitimate non-discriminatory reasons for its employment decision, the plaintiff fails to produce evidence that such reasons are merely a pretext for discriminatory animus.[7]

In age discrimination cases, a prima facie case is established when the plaintiff presents evidence (1) that he was discharged; (2) that he was qualified for the position, (3) that he was within the protected age group; and (4) that he was (i) replaced by someone outside the

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[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Coke v. Gen. Adjustments Bureau*, 640 F.2d 584, 595 (5th Cir. 1981 (en banc)).

[4] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[5] *Id.* at 323.

[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993).

[7] *See Bodenheimer*, at 957.

protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age.[8]

PCC contends that because this is a reduction in force case the Court should require Sapp to establish the slightly modified prima facie case applicable in reduction in force scenarios, which requires either direct or circumstantial evidence of age discrimination.[9] However, the prima facie case set out above addresses both the standard age discrimination scenario and the reduction in force situation. If the position has been filled by another person, then the presumption of discrimination is created by evidence that the replacement was younger or outside the protected age group. If the position is eliminated altogether, the plaintiff may still create an inference of discrimination by presenting evidence of discrimination.

Sapp has established a prima facie case. It is undisputed that he was discharged. Sapp has presented evidence that he was qualified, and PCC has conceded this in the course of arguing that he was less qualified than the four people who were retained. At age fifty-six, Sapp was within the protected class of people over age forty. Finally, Sapp presented evidence that PCC filled the position with Munchrath, a forty-nine year old whose position was eliminated at the time.

Once a prima facie case is established by the plaintiff, the burden then shifts to the defendant to articulate a

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[8] *Id.*

[9] *See Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981).

legitimate, non-discriminatory reason for the employment decision.[10] PCC has carried this burden with evidence that it was downsizing the company, that it eliminated at least one position from Sapp's department, and that Sapp was discharged after being compared to other more qualified employees.

Once the defendant meets the burden of producing a legitimate explanation, the burden shifts to the plaintiff to produce admissible evidence that the proffered reasons are not in fact the reasons for the employment decision, and are merely a pretext for age discrimination.[11] The plaintiff must be able to point to evidence that the defendant was motivated by discriminatory animus in their employment decision.[12] In support of his case, Sapp presents a detailed analysis of the criteria used to decide which employees to retain. As further evidence of pretext, Sapp presents (1) a remark made by a senior official in the company over five years ago; (2) a decline in the average age of employees after the reduction; and (3) the fact that service and age were noted during the reduction in force.

Sapp's attempt to breakdown the criteria used by PCC to compare the five employees fails to strengthen his case. It is well settled that the ADEA was not intended to be a vehicle for second-guessing employment decisions

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[10] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[11] *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993).

[12] *Id.*

nor to transform the courts into personnel managers.[13] "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated."[14] It is not enough to simply cast doubt on the employer's decision-making process; the plaintiff must be able to point to direct evidence of discriminatory intent, evidence that the employer deviated from standard evaluation practices, or other differences in treatment and placement of employees that correlates to age.[15] Sapp has not pointed to anything in the evaluation process that would lead the Court to conclude that PCC's employment decisions were driven by age discrimination.

The remark "sometimes us old fogies must move over for these younger dynamic guys" does not show pretext. For an isolated remark to constitute evidence of discrimination, it must be (1) made by either the decision maker or someone whose recommendation was considered by the decision maker, (2) related to the specific employment decision challenged, and (3) made close in time to the decision.[16] The remark set forth by Sapp was made years ago in the context of an entirely separate restructuring of the company by someone who did not participate in the decision to discharge Sapp.

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[13] *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988).

[14] *Id.*

[15] *Id.*

[16] *Turner v. North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992).

Similarly, consideration of an employee's length of service and age is not evidence of age discrimination: The Fifth Circuit has rejected any argument to the contrary and stated that such a rule would work the absurd result that an employer would be unable to discuss pension and severance packages with a discharged employee.[17]

For lack of any other proof, the statistical evidence alone must establish that PCC's proffered reasons for discharging Sapp were mere pretext for age discrimination. Gross statistical disparities which result from a reduction in force may be evidence of discriminatory intent.[18] However, the statistics must be strong enough to rebut the valid, nondiscriminatory reason for the discharge.[19] To rebut an employer's explanation on the basis of statistics alone would be a "challenging endeavor" indeed.[20]

Generally, a plaintiff using statistical proof must make the required showing of discrimination by comparing persons qualified for the position at issue.[21] However, evidence that the average age of the work force as a whole has decreased dramatically may also indicate discriminatory intent.[22] In either case, the statistical evidence must be of a quality that raises a genuine issue of

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[17] *Bodenheimer*, 5 F.3d at 958.

[18] *Walther v. Lone Star Gas Co.*, 977 F.2d 161, 162 (5th Cir. 1992) (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir. 1983)).

[19] *Id.*

[20] *Thornbrough*, 760 F.2d at 647; *Walther*, 977 F.2d at 162.

[21] *E.E.O.C. v. American Airlines, Inc.*, 835 F.Supp. 911, 914 (N.D. Tex. 1993).

[22] *See Schulz v. Hickok Mfg. Co.*, 358 F.Supp. 1208, 1213 (N.D. Ga. 1973).

fact as to whether the employer was driven by discriminatory animus.

Sapp's evidence fails to meet the challenge. He has analyzed three different groups of people: console operators, tape/print team leaders, and tape service employees. For each group, Sapp computed the average age of persons considered for discharge, the average age of the persons not considered for discharge, and the average age of each group before and after the termination. Sapp averaged the numbers without the benefit of statistical analysis; the Court notes not the inadequacy but rather the utter absence of statistical "technique". Each group is numerically quite small. The most relevant group, the team leaders group of which Sapp is a member, is composed of only five people all of whom are in the protected age group. Only one person, Sapp, was laid off. Accordingly, the numbers have virtually no statistical significance.[23] In short, the Court cannot find that the numbers alone constitute probative evidence of pretext.

Sapp has failed to present any evidence which raises a genuine issue of fact as to whether PCC's proffered reasons were mere pretext for discrimination. The motion for summary judgment is granted on this ground. Accordingly, the Court does not reach the question of

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[23] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996-97 (1987) (small or incomplete data sets and inadequate statistical techniques are typical weaknesses of statistical proof); *see also International Board of Teamsters v. United States*, 431 U.S. 324, 339-340 n. 20 (1977) (small sample size detracts from value of statistical evidence).

whether PCC's parent company, McDermott should be treated as Sapp's employer.

CONCLUSION

For the reasons stated above, the Motion is **GRANTED.** It is so **ORDERED.**

SIGNED THIS 5 DAY OF SEPT, 1995.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT COURT
CHIEF JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10931

CLEVE E SAPP

Plaintiff - Appellant

v.

POWER COMPUTING COMPANY; MCDERMOTT, INC.

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(May 24, 1996)

Before KING, JOLLY, PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

REHG-2

SUBSIDIARIES AND AFFILIATES OF MCDERMOTT INCORPORATED

ABAHSAIN HUDSON HEAT TRANSFER CO. LTD.; AMERICON EQUIPMENT SERVICES, INC.; AMERICON, INC.; ASEA BABCOCK; ASH ACQUISITION COMPANY; B.C. BRIDGE & DREDGING CO. LTD; B&W DE PANAMA, INC.; B&W ENERGY INVESTMENTS, INC.; B&W FEDERAL SERVICES, INC.; B&W FUEL, INC.; B&W HANFORD COMPANY; B&W MEXICANA, S.A. DE C.V.; B&W NUCLEAR ENVIRONMENTAL SERVICES, INC.; B&W NUCLEAR, INC.; B&W PROTEC, INC.; B&W SABA, INC.; B&W SAVANNAH RIVER COMPANY; B&W SERVICE COMPANY; B&W SOFC G.P., INC.; B&W SOFC L.P., INC.; B&W SUNNYSIDE, INC.; B&W SUNNYSIDE, L.P.; B&W TRISO CORPORATION; B&W/OHM WELDON SPRING, INC.; BABCOCK & WILCOX – ST COMPANY; BABCOCK & WILCOX ASIA INVESTMENT CO., INC.; BABCOCK & WILCOX ASIA LIMITED; BABCOCK & WILCOX BEIJING COMPANY, LTD.; BABCOCK & WILCOX CHINA INVESTMENT CO., INC.; BABCOCK & WILCOX CONSTRUCTION CO., INC.; BABCOCK & WILCOX EBENSBURG POWER, INC.; BABCOCK & WILCOX EGYPT SAE; BABCOCK & WILCOX EQUITY INVESTMENTS, INC.; BABCOCK & WILCOX FOREIGN SALES CORPORATION; BABCOCK & WILCOX GAMA KAZAN TEKNOLOJISI A.S.; BABCOCK & WILCOX GENERAL CONTRACTING COMPANY; BABCOCK & WILCOX GOVERNMENT SERVICES COMPANY; BABCOCK & WILCOX IDAHO, INC.; BABCOCK & WILCOX INDUSTRIES LTD.; BABCOCK & WILCOX INTERNATIONAL INVESTMENTS CO., INC.; BABCOCK &

WILCOX INTERNATIONAL SALES AND SERVICE CORPORATION; BABCOCK & WILCOX INTERNATIONAL SALES CORPORATION; BABCOCK & WILCOX INTERNATIONAL, INC.; BABCOCK & WILCOX INVESTMENT COMPANY; BABCOCK & WILCOX JONESBORO POWER, INC.; BABCOCK & WILCOX OHIO, INC.; BABCOCK & WILCOX SERVICES, INC.; BABCOCK & WILCOX TRACY POWER, INC.; BABCOCK & WILCOX WEST ENFIELD POWER, INC.; BABCOCK-ULTRAPOWER JONESBORO; BABCOCK-ULTRAPOWER WEST ENFIELD; BADYA BUILDERS, INC.; BJA-MENTOR PRODUCTION SYSTEMS LIMITED; BROWN & ROOT MCDERMOTT FABRICATORS LIMITED; CATALYTIC MAINTENANCE LIMITED; CCC FABRICACIONES Y CONSTRUCCIONES S.A. DE C.V.; CHARTERING COMPANY (SINGAPORE) PTE. LTD.; CHIYODA HUDSON INTERNATIONAL INC.; CMIR HOLDINGS LTD.; CONSTRUCCIONES MARITIMAS MEXICANAS, S.A. DE C.V.; CREOLE INSURANCE COMPANY, LTD.; DAVY MCDERMOTT LIMITED; DEEP OIL TECHNOLOGY, INC.; DELTA BIRWELCO, INC.; DELTA CATALYTIC (HOLLAND) B.V.; DELTA CATALYTIC (UK) LIMITED; DELTA CATALYTIC CONSTRUCTORS LTD.; DELTA CATALYTIC ENGINEERING LTD.; DELTA CATALYTIC ENVIRONMENTAL SERVICES LTD.; DELTA CATALYTIC INDUSTRIAL SERVICES LTD.; DELTA CATALYTIC INTERNATIONAL CORP.; DELTA CATALYTIC LIMITED; DELTA CATALYTIC PLANT SERVICES LTD.; DELTA CATALYTIC SAUDI ARABIA LTD.; DELTA CATALYTIC SERVICES INC.; DELTA HUDSON ENGINEERING CORPORATION; DELTA HUDSON EINGINEERING LTD.; DELTA HUDSON GOVERNMENT SERVICES,

INC.; DELTA HUDSON INTERNATIONAL, INC.; DELTA HUDSON INTERNATIONAL, LTD.; DELTA PROJECTS (EASTERN) LIMITED; DELTA SERV-TECH LTD.; DIAMOND POWER (AUSTRALIA) PTY. LIMITED; DIAMOND POWER FINLAND OY; DIAMOND POWER HUBEI MACHINE COMPANY, LTD.; DIAMOND POWER SPECIALTY (JAPAN) LTD.; DIAMOND POWER SPECIALTY CORPORATION; DIAMOND POWER SPECIALTY GMBH; DIAMOND POWER SPECIALTY LIMITED; DIAMOND SUPERIOR AKTIEBOLAG; DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY; EASTERN MARINE SERVICES, INC.; EBENSBURG INVESTORS LIMITED PARTNERSHIP; EBENSBURG POWER COMPANY; ENSERCH ENVIRONMENTAL MANAGEMENT COMPANY, INC.; ESPECIALIDADES TERMOMECANICAS, S.A. DE C.V.; ETPM INTERNATIONAL S.A.S.; EUROMAC LTD.; FIRST EMIRATES TRADING CORPORATION; GLOBE STEEL TUBES CORPORATION; GREENBANK TEROTECH PTY. LIMITED; HALLEY-MELLOWES PTY. LTD.; HEEREMA-MCDERMOTT (AUST.) PTY. LTD.; HEEREMAC V.O.F.; HONORE INSURANCE COMPANY, LTD.; HUDSON ENGINEERING (AUSTRALIA) LTD.; HUDSON ENGINEERING (CANADA), LTD.; HUDSON ENGINEERING COMPANY, INC.; HUDSON ENGINEERING DE VENEZUELA, C.A.; HUDSON ENGINEERING INTERNATIONAL, INC.; HUDSON HEAT TRANSFER INTERNATIONAL, INC.; HUDSON NORTHERN INDUSTRIES INC.; HUDSON PRODUCTS AKTIEBOLAG; HUDSON PRODUCTS CORPORATION; HUDSON PRODUCTS DE MEXICO, S.A. DE C.V.; HYDRO MARINE SERVICES, INC.; INITEC, ASTANO Y

MCDERMOTT INTERNATIONAL INC., S.A.; INTERNATIONAL DISARMAMENT CORPORATION; J. RAY MCDERMOTT (AUST.) HOLDING PTY. LIMITED; J. RAY MCDERMOTT (U.K.) INC.; J. RAY MCDERMOTT (VENEZUELA) C.A.; J. RAY MCDERMOTT ARCTIC LTD.; J. RAY MCDERMOTT CONTRACTORS, INC.; J. RAY MCDERMOTT DIVING INTERNATIONAL, INC.; J. RAY MCDERMOTT ENGINEERING HOLDINGS, INC.; J. RAY MCDERMOTT HOLDINGS, INC.; J. RAY MCDERMOTT INTERNATIONAL SERVICES LIMITED; J. RAY MCDERMOTT INTERNATIONAL, INC.; J. RAY MCDERMOTT LONDON, LTD.; J. RAY MCDERMOTT MARINE CONSTRUCTION AS; J. RAY MCDERMOTT PROPERTIES, INC.; J. RAY MCDERMOTT SPARS, INC.; J. RAY MCDERMOTT UNDERWATER SERVICES, INC.; J. RAY MCDERMOTT VENTURE HOLDINGS (U.S.), INC.; J. RAY MCDERMOTT, INC.; J. RAY MCDERMOTT, S.A.; MACDOCK SHIPYARD COMPANY, LTD.; MACSHELF LTD; MACSHELF MARINE CONSTRUCTION COMPANY, LTD.; MAINE POWER SERVICES; MALMAC SON, BHD.; MARINE CONTRACTORS, INC.; MCAMUR CONSTRUCTION SERVICES T.O.O.; MCAMUR SHIPBUILDING COMPANY, INC.; MCANTILLE, N.V.; MCDERMOTT (HOLLAND) B.V.; MCDERMOTT (MALAYSIA) SENDIRIAN BERHAD; MCDERMOTT (NIGERIA) LIMITED; MCDERMOTT – ETPM V.O.F.; MCDERMOTT – ETPM, INC.; MCDERMOTT ABU DHABI OFFSHORE CONSTRUCTION COMPANY; MCDERMOTT AMUR, INC.; MCDERMOTT APG SERVICES LIMITED; MCDERMOTT ARABIA COMPANY LIMITED; MCDERMOTT AZERBAIJAN MARINE CONSTRUCTION, INC.; MCDERMOTT AZERBAIJAN

PIPELINES, INC.; MCDERMOTT AZERBAIJAN, INC.; MCDERMOTT CENTRAL & EASTERN EUROPE, INC.; MCDERMOTT DENMARK APS; MCDERMOTT ENERGY SERVICES, INC.; MCDERMOTT ENGINEERING (EUROPE) LIMITED; MCDERMOTT ENGINEERING HOUSTON, LLC; MCDERMOTT ENGINEERS & CONSTRUCTORS (CANADA) LTD.; MCDERMOTT ENGINEERS & CONSTRUCTORS (USA) INC.; MCDERMOTT FAR EAST, INC.; MCDERMOTT GULF OPERATING COMPANY, INC.; MCDERMOTT HEAT TRANSFER COMPANY; MCDERMOTT HOLDINGS (U.K.) LIMITED; MCDERMOTT INCORPORATED; MCDERMOTT INDUSTRIES (AUST.) PTY. LIMITED; MCDERMOTT INLAND SERVICES, INC.; MCDERMOTT INTERNATIONAL ASSET MANAGEMENT, LTD.; MCDERMOTT INTERNATIONAL AVIATION, INC.; MCDERMOTT INTERNATIONAL B. V.; MCDERMOTT INTERNATIONAL BEIJING, INC.; MCDERMOTT INTERNATIONAL ENGINEERING & CONSTRUCTION CO., LTD.; MCDERMOTT INTERNATIONAL ENGINEERING INVESTMENTS N.V.; MCDERMOTT INTERNATIONAL GENERAL SERVICES, INC.; MCDERMOTT INTERNATIONAL INVESTMENTS CO., INC.; MCDERMOTT INTERNATIONAL MARINE INVESTMENTS N.V.; MCDERMOTT INTERNATIONAL MARINE SERVICES, INC.; MCDERMOTT INTERNATIONAL MARKETING, INC.; MCDERMOTT INTERNATIONAL PROJECT MANAGEMENT, INC.; MCDERMOTT INTERNATIONAL TRADING (HOLLAND 1) B.V.; MCDERMOTT INTERNATIONAL TRADING CO., INC.; MCDERMOTT INTERNATIONAL, INC.; MCDERMOTT MARINE CONSTRUCTION LIMITED; MCDERMOTT MARINE UK LIMITED; MCDERMOTT

MARKETING SERVICES, INC.; MCDERMOTT OFFSHORE SERVICES COMPANY, INC.; MCDERMOTT OVERSEAS INVESTMENT CO. N.V.; MCDERMOTT OVERSEAS, INC.; MCDERMOTT PRODUCTOS INDUSTRIALES DE MEXICO, S.A. DE C.V.; MCDERMOTT PROJECT MANAGEMENT (CYPRUS) LIMITED; MCDERMOTT PROJECT MANAGEMENT, INC.; MCDERMOTT SAKHALIN, INC.; MCDERMOTT SERVICOS DE CONSTRUCAO, LTDA.; MCDERMOTT SHIPBUILDING, INC.; MCDERMOTT SOUTH EAST ASIA PTE. LTD.; MCDERMOTT SUBMARINE CABLE LTD.; MCDERMOTT SUBMARINE CABLE SYSTEM LIMITED; MCDERMOTT SUBSEA CONSTRUCTORS LIMITED; MCDERMOTT TRADE CORPORATION; MCDERMOTT WEST INDIES COMPANY; MCDERMOTT-ETPM (NORWAY), INC.; MCDERMOTT-ETPM (UK) LIMITED; MCDERMOTT-ETPM B.V.; MCDERMOTT-ETPM EAST (MAURITIUS) LTD.; MCDERMOTT-ETPM EAST B.V.; MCDERMOTT-ETPM EAST N.V.; MCDERMOTT-ETPM EAST, INC.; MCDERMOTT-ETPM FAR EAST, INC.; MCDERMOTT-ETPM N.V.; MCDERMOTT-ETPM S.A.; MCDERMOTT-ETPM WEST, INC.; MENCK B.V.; MENCK GMBH; MENTOR ENGINEERING CONSULTANTS LIMITED; MENTOR ENGINEERING, INC.; MIMCO, INC.; MIT (HONG KONG) TRADING LIMITED; MOFCO N.V.; NATIONAL ECOLOGY (ALABAMA) INCORPORATED; NATIONAL ECOLOGY COMPANY; NORTH AMERICAN CWF PARTNERSHIP; NORTH ATLANTIC VESSEL, INC.; NORTH COUNTY OPERATIONS ASSOCIATES; NORTHERN MARINE SERVICES, INC.; OCEANIC RED SEA COMPANY; OFFSHORE ANGOLA, LTD.; OFFSHORE ENERGY CAPITAL CORPORATION; OFFSHORE

HYUNDAI INTERNATIONAL LIMITED; OFFSHORE HYUNDAI INTERNATIONAL, LTD.; OFFSHORE MARINE CHARTERING NV; OFFSHORE PETROLEUM DIVERS, INC.; OFFSHORE PIPELINES (MAURITIUS) LTD.; OFFSHORE PIPELINES FAR EAST LIMITED; OFFSHORE PIPELINES INTERNATIONAL GULF E.C.; OFFSHORE PIPELINES INTERNATIONAL, LTD.; OFFSHORE PIPELINES NIGERIA LIMITED; OFFSHORE PIPELINES SDN. BHD.; OFFSHORE POWER GENERATION LTD.; OFFSHORE PRODUCTION & SALVAGE, INC.; OFFSHORE PRODUCTION VESSELS, LTD.; OPI INTERNATIONAL VESSELS, LTD.; OPI OFFSHORE NETHERLANDS HOLDING B.V.; OPI SALES & SERVICE CORPORATION; OPI TOWING & SUPPLY, L.L.C.; OPI VESSELS, INC.; OPMI, E.C.; OPMI, LTD.; P. T. ARMANDI PRANAUPAYA; P. T. BABCOCK & WILCOX INDONESIA; P. T. BATAVES FABRICATORS; P. T. MCDERMOTT INDONESIA; PALM BEACH ENERGY ASSOCIATES; PALM BEACH RESOURCE RECOVERY CORPORATION; PANAMA OFFSHORE CHARTERING COMPANY 1, INC.; PANAMA OFFSHORE CHARTERING COMPANY 10, INC.; PANAMA OFFSHORE CHARTERING COMPANY 11, INC.; PANAMA OFFSHORE CHARTERING COMPANY, 12, INC.; PANAMA OFFSHORE CHARTERING COMPANY 13, INC.; PANAMA OFFSHORE CHARTERING COMPANY 14, INC.; PANAMA OFFSHORE CHARTERING COMPANY 15, INC.; PANAMA OFFSHORE CHARTERING COMPANY 16, INC.; PANAMA OFFSHORE CHARTERING COMPANY 17, INC.; PANAMA OFFSHORE CHARTERING COMPANY 18, INC.; PANAMA OFFSHORE CHARTERING

COMPANY 19, INC.; PANAMA OFFSHORE CHARTERING COMPANY 2, INC.; PANAMA OFFSHORE CHARTERING COMPANY 20, INC.; PANAMA OFFSHORE CHARTERING COMPANY 21, INC.; PANAMA OFFSHORE CHARTERING COMPANY 3, INC.; PANAMA OFFSHORE CHARTERING COMPANY 4, INC.; PANAMA OFFSHORE CHARTERING COMPANY 5, INC.; PANAMA OFFSHORE CHARTERING COMPANY 6, INC.; PANAMA OFFSHORE CHARTERING COMPANY 7, INC.; PANAMA OFFSHORE CHARTERING COMPANY 8, INC.; PANAMA OFFSHORE CHARTERING COMPANY 9, INC.; PANAMA OFFSHORE CHARTERING COMPANY, INC.; PARADIGM CONSTRUCTORS LTD.; PDC MANTENIMIENTO, S.A.; PERSONAL ADMINISTRATIVO DE VERA CRUZ, S.A. DE C.V.; PERSONAL EJECUTIVO DE VERACRUZ, S.A. DE C.V.; POWER SYSTEMS OPERATIONS, INC.; POWER SYSTEMS SUNNYSIDE OPERATIONS GP, INC.; POWER SYSTEMS SUNNYSIDE OPERATIONS LP, INC.; PSO CARIBBEAN, INC.; REVLOC RECLAMATION SERVICE, INC.; ROCKY FLATS TECHNICAL ASSOCIATES, INC.; SABINE RIVER REALTY, INC.; SAKHALIN ENERGY INVESTMENT COMPANY, LTD.; SAMBURG HOLDINGS, INC.; SAUDI OPMI COMPANY LIMITED; SHARMAN, ALLEN, GAY & TAYLOR, S.A.; SOFCO L.P.; SOUTH POINT CWF; SPARS INTERNATIONAL INC.; SUNLAND CONSTRUCTION CO., INC.; SUNNYSIDE COGENERATION ASSOCIATES; SUNNYSIDE OPERATIONS ASSOCIATES L.P.; TALLARES NAVALES DEL GOLFO, S.A. DE C.V.; THE BABCOCK & WILCOX COMPANY; THE EARLY COMPANY; THERMAX BABCOCK & WILCOX LIMITED; TIGER SULPHUR OPERATIONS

LTD.; TL MARINE SDN. BHD.; TL OFFSHORE SDN. BHD.; TRISO; TRISPEC TECHNICAL SERVICES LTD.; UNIVERSAL FABRICATORS INCORPORATED; VANCOUVER PILE DRIVING LTD.; VARSY INTERNATIONAL N.V.; W. F. AND JOHN BARNES COMPANY; WAGLEY, INC.; 349114 ALBERTA LTD.; 404385 ALBERTA LTD.; 418718 ALBERTA LTD.